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WM. R. STANSBURY
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Supreme Court of the United States

OCTOBER TERM 1922

No. 276

THE FIRST NATIONAL BANK OF SAN JOSE,
Plaintiff in Error,

vs.

THE STATE OF CALIFORNIA,
Defendant in Error.

In Error to the Supreme Court of the State of California.

Reply Brief of Plaintiff in Error

S. F. LEIB,
Attorney for First National Bank of San Jose, Plaintiff in Error.

IN THE

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Reply Brief of Plaintiff in Error.

It is claimed by respondent that an escheat by the State is not contrary to any **express** law of the United States.

How can that claim be successfully asserted when Section 5136 of the United States Revised Statutes expressly provides that National Banks are in express terms given the power by Congress to receive deposits and to loan the same and to **keep** the same **loaned** out, without imposing any limit as to the duration of the time of such loan?

Until the depositor, or his assignee, calls for the payment of such loan, the National Bank is not called upon to repay it. If the depositor fails to demand its repayment, either upon his own motion or in answer to the advertisement under the provisions of Sections 5220, 5221, 5222, 5234, 5235 or 5236 of the United States Revised Statutes, then the officers of the United States

are not only **permitted**, but are **directed** to use such deposits in paying the unpaid deposits, and **if not** needed for **that** purpose, **then** to distribute pro rata such deposits **among the then shareholders of such bank.**

These are the **express** laws of the United States under which the officers of the United States act while enforcing such laws.

How then can it be said that the **State** Statute is not in direct violation of these **express** laws of the United States?

Moreover, the United States (Section 5191 United States Revised Statutes) expressly provides that a National Bank doing business in cities of the population of San Jose, can loan and keep loaned 85% of its deposits and that such bank is entitled to keep, as its own property, the interest it continuously receives from such loan as long as such loan is in existence.

Under the express right given to such bank to loan such 85% of its deposits and to keep as its own, the interest derived therefrom, how can it be said that a State has a right to violate the very terms of the National Bank law, which, in **express** terms, gives to the National Bank the right and power to make such loan and to keep in existence such loan and thereby acquire the interest accruing therefrom?

What right has the State to violate and nullify such rights thus given to the National Bank by the National Government?

As we have shown in our opening brief, the United States had the full right **to escheat to itself** such deposits, if not called for or received **by the depositor.** Instead of doing so, however, it transferred that right, **by express language,** to other depositors, if **needed** by them, in order that they should receive full payment; and if **not** so

needed, then to distribute the same pro rata to the then shareholders. Would not confiscation of such deposits be a direct violation **of the express language of Congress?**

Not only that, but has not our Supreme Court **over and over again** said that the system adopted by Congress for the management of National Banks, **"was complete in itself,"** and that therefore the State could not in any way or to any extent interfere with it.

Would not the Court, at this point, please read the several quotations from our opening brief as to this matter, and observe how clearly the Supreme Court of the United States has so stated; and also observe how clearly it has stated that when Congress has dealt with a subject-matter, that what it has said in so dealing with such subject-matter absolutely precludes the State from dealing with that matter at all, either by broadening or narrowing what was said by Congress, or by dealing with the subject-matter in any way whatsoever. If it were otherwise, would not every one of the forty-eight states have the right to deal with the same matter in a different manner and hence could not every state have a law different from the law in every other State, and hence "make confusion more confounded."

[redacted]"

Is what our Supreme Court has said in all these matters to go for naught—to count for nothing—to allow a State to dictate or enact a law for its **own** ends and to thereby frustrate and nullify a law enacted by Congress for the good of the whole nation?

If this enactment by the State is upheld, as being applicable to National Banks, will not the National Banks in every State in the Union be at the mercy of the dictation of the respective states in which they are respectively situated?

It may be here remarked that if the State Statute was a valid law as to the deposits made in National Banks, then the law passed by Congress that such deposits should be **taxed** in favor of the Federal Treasury, would be nullified to the extent of such taxes, notwithstanding the express provisions of Sections 5214 and 5215 of the United States Revised Statutes which provide in **express** words that such taxes should be levied and paid into the United States Treasury.

Before closing this reply it is worthy to remark that not a single case cited by the respondent involved the question that is now before this Court excepting what was known as the Oregon case, to-wit, the case of the State of Oregon vs. First National Bank of Portland, 123 Pac. 712; and even in that case the main reason given by the Supreme Court of Oregon was that the State was not injured by compelling it to pay the deposit, which it did not owe the State, but which it **did** owe the depositor of the amount of money so confiscated by the State, inasmuch as, that for every dollar that was paid to the State, by the National Bank, would be deducted from the amount of such deposits so paid.

This claim by the respondent we submit is not very satisfactory reasoning since the payment of such deposit would only lessen the interest bearing deposit which it had loaned and thereby lessen the amount of its interest bearing loans; and especially would this be so in view of the fact that it was not paid to the depositor but to the party under the statute enacted by the State purely for its own ends and without having any possible right to obtain such money by a violation and nullification of the banking laws of the United States of America.

Please read what is said in our opening brief under "d" pages 28 and 29 which includes the forceable and

unanswerable view of Chief Justice Marshall on this very point. Also please read the pages following page 29 in our opening brief which very clearly shows that our own Supreme Court was of the opinion that our National Bank laws made the rights of the depositors **"in the nature of a tontine"**, and that therefore the National Bank laws, if the construction above stated ever came in question, would govern distribution of uncalled for deposits which were thus **"in the nature of a tontine"**.

We most earnestly submit that the National Bank law made by the same authorities as created the National Banks themselves, should be protected against State confiscation which is attempted to be made in this case. All of which is respectfully submitted,

S. F. LEIB,
Attorney for Plaintiff in Error.

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CLERK

Brief of Plaintiff in Error

Supreme Court of the United States

OCTOBER TERM 1922

No. 276

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SUBJECT INDEX.

Note: An addenda containing the quotations of or from the U. S. Revised Statutes and the U. S. Compiled Statutes will be found in this brief immediately following the signature of the attorney to such brief. The arrangement of such U. S. Revised Statutes and of such Compiled Statutes will be found arranged in numerical order so that they can be readily referred to by the Court by simply turning to the same.

Section 1273 of the Code of Civil Procedure of California and the duplicate of such section in Section 15 of the Bank Act of California, both passed in the legislature of California in 1915, are not valid laws as against the National Bank laws of the United States and do not and cannot escheat any of the deposits made in such National Banks to the State of California sinch such State Statutes are in direct violation of the National Bank laws of the United States as to the ownership and right of enjoyment by a National Bank of the United States as to any deposit made with it by which it became the owner of such deposit, and of which, under the laws of the United States, it continued to be the owner and will continue to be the owner until such ownership is either ended by the payment thereof to the depositor upon his check or checks drawn therefor or on the demand of his assignee or his heir or executor, or when distributed under one or more of sections 5220, 5221, 5234, 5235, 5236 of the Revised Statutes of the United States upon the dissolution of such National Bank.

All points in this brief are embodied in the foregoing point and the cases cited in the brief and the statutes of the United States also cited and set out in the brief all

go to support the point above stated. The Statutes of the United States cited in the brief will be found set out in the Addenda printed at the end of this brief. The authorities cited in the brief are but few in number of the many that are similar. They are alphabetically arranged and are cited in support of the foregoing proposition or of some part thereof and are found in the brief at the places here stated:

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Brief of the First National Bank of San Jose, Plaintiff in Error

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In the Supreme Court of the United States

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THE FIRST NATIONAL BANK OF SAN JOSE,
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Defendants in Error.

I.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

On June 3, 1864 Congress passed what is known as the National Bank Law. That law by its very terms provided for the formation of National Bank corporations and, by its express terms gave those corporations the right and power to receive deposits, to keep such deposits loaned out to the extent of 85% thereof, the other 15% to be kept on hand for the safety of the bank. These

laws do not *limit,* nor did they ever limit, *the time during which* such 85% of such deposits could be kept loaned by the bank nor did such laws ever in any way provide or even intimate that any of the interest received from such loans should belong to anyone *other* than to the bank loaning the same. Such laws also provided, and still provide, that when the bank goes into liquidation, whether voluntary or involuntary, it shall advertise that all claims held against the bank shall be presented for payment and that all claims *not* presented shall, if needed therefor, be used for the payment of the Bank's debts; and *if not needed* for *that* purpose, *then* the same shall be *distributed* pro rata, among the then existing shareholders of the bank. In other words, these United States banking laws provide, and ever since the passage thereof in 1864, have provided, that the National Banks shall have the right to make loans, to keep 85% of such loans loaned out without any time limit, *shall receive and own all the income arising from such loans until the dissolution of such bank,* and upon such dissolution any deposit or deposits not presented for payment, or, if presented but not allowed, should *belong to the bank* and should be, *if needed,* used for the payment of any debts owing by the bank, and if not needed for that purpose, *then* the same *should be distributed pro rata among the shareholders of such bank then existing.* All these laws are *express* laws and cannot be set aside either in whole or in part by any State Legislation.

Not only is the National Bank entitled to, and the owner of all money deposited with it from the time of such deposit together with all income arising from such deposits during the time between the making of such deposits and the time the bank, in which the same is

made, goes into liquidation, as above stated, *but the United States itself* is entitled *to collect a revenue* from *all* such deposits *for its own use* without the same having been diminished in any way or to any extent by a State confiscating the same *or any part* thereof to itself. Such revenue was fixed by Section 5214 of the Revised Statutes, as will be seen when that Section is quoted in full in the addenda hereto. Notwithstanding the United States Statutes itself has given the rights above stated to the National Banks without any right of a state to interfere therewith and also has reserved to itself the right to collect a revenue upon the full average annual amount of such deposits, the state has passed a law in 1915, towit Section 1273 of the Code of Civil Procedure of the State of California, wherein it states as follows:

> "All amounts of money heretofore or hereafter deposited in any bank to the credit of the depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of the principal or interest, or where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase or proceeds thereof, *escheat to the State.*"

A similar section, substantially the same as Section 1273 of the Code of Civil Procedure, was passed the same year by an amendment of Section 15 of the Bank Act which also will be quoted hereafter but which, being substantially the same, will not need to be further referred to. Both of those sections are fully set out in the Petition for Writ of Error, pages 67 to 70 of the Record herein, where the same can be read, should the Court desire to read them in full. The only part of either of such

sections, however, involved in this case, is quoted above.

While neither of those section purport to refer to National Banks yet the Courts of this State in this case have held that such sections were intended to apply to National Banks and that they do limit the amount which such National Banks were receiving as interest before such state law was passed, as well as confiscating to itself all of such deposits. This case is based upon the fact that on November 10, 1880 one P. A. Campbell deposited $1192.25 in the First National Bank of San Jose, the plaintiff in error in this case. It is alleged in the complaint brought by the State of California, that such deposit had never been enlarged by any additional deposit in said bank nor been lessened by any withdrawal of any part thereof, either principal or interest, and that neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence, and therefore claims that such deposit has under such Statutes of such State escheated to the State of California, and such state thereupon asked judgment accordingly, which was granted by the State Courts, and which if allowed to stand will deprive the National Bank of the whole amount of the money constituting such deposit and would prevent such deposit from hereafter producing any income in favor of such National Bank on any loans made by it on 85% of said $1192.25 of money deposited by said Campbell (and which become the *bank's* money the moment of such deposit) and would also prevent such deposit upon the liquidation of such bank, whenever such liquidation might occur, from using any part of such deposit for the payment of any debts, should the same be needed therefor, or, if not needed therefor, would prevent the distribution of any part thereof to the then share-

holders of said bank which would otherwise be distributed to them upon such liquidation. It will thus be seen that if such State Statute can be held valid it would deprive the rights of the National Bank *expressly* given it by the Revised Statutes of the United States and would also deprive the National Government itself of its revenue which it would receive from the bank upon such deposit, had such deposit not been wiped out of existence by the State confiscating the same to its own use.

Upon the Supreme Court of California denying the petition of the plaintiff in error herein for a rehearing from its judgment rendered against such plaintiff in error, the plaintiff in error petitioned for and obtained a writ of error whereby said case was brought to this Court to obtain a judgment reversing such judgment entered by the Supreme Court of California, which such latter named Court refused to grant a rehearing.

Another point urged and which is again urged, is, as held by this Court as follows:

> "If Congress have constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the Legislation to Congress, to prescribe *additional* regulations, and what they may deem auxiliary provisions for the same purpose. In such case the Legislature of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any *further* legislation to act upon the subject-matter. Its *silence* as to what it *does not* do, is as *expressive* of what its *intention* is as the *direct* provisions made by it."
>
> Prigg vs. Pennsylvania, 16 Peters 539.

This has many times been held by the Supreme Court of the United States as will be seen hereafter.

The question involved in this case is very simple, viz.: Has the State Statute of Section 1273 of the Code of Civil Procedure of California, above referred to, the effect of causing the title of the Bank to said deposit, to pass from the First National Bank of San Jose to the State of California?

In determining this question we might also point out the fact at this place that by the decisions of the Supreme Court of the United States as well as the decisions of the State of California, the *moneys* deposited with the Bank *immediately* upon such deposit being made become the property of such bank and the bank simply *owes the debt* which it incurred by *receiving* and becoming the *owner* of such deposit.

In the case of New York County National Bank vs. Massey, 24 Sup. Ct. Rep. 199, 200-201, it is stated:

> "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes *a part of the general fund of the bank,* to be dealt with by it as *other* moneys, to be lent to customers, and *parted* with *at the will* of the bank, and the *right of the depositor* is to have this debt *repaid in whole or in part by honoring checks drawn against the deposits.* It creates an *ordinary* debt, not a privilege or right of a fiduciary character. *National Bank v. Millard,* 10 Wall. 152, 19 L. ed. 897. Or, as defined by Mr. Justice White, in the case of *Davis v. Elmira Sav. Bank,* 161 U. S. 288, 40 L. ed. 702, 16 Sup. Ct. Rep. 505; 'The deposit of money by a customer with his banker *is one of loan,* with the superadded obligation that the money is to be paid, when demanded, *by a check.*' *Scammon v. Kimball,* 92 U. S. 369, 23 L. ed. 485."

II.

ASSIGNMENT OF ERRORS.

THE FIRST NATIONAL BANK OF SAN JOSE, THE PLAINTIFF IN ERROR HEREIN, HEREBY SPECIFIES THE FOLLOWING ERRORS AS BEING RELIED UPON BY IT FOR THE REVERSAL OF THE JUDGMENT ENTERED AGAINST IT IN THIS CASE BY THE SUPREME COURT OF THE STATE OF CALIFORNIA AND HEREIN SETS OUT SEPARATELY AND PARTICULARLY EACH ERROR ASSERTED AND INTENDED TO BE URGED.

SPECIFICATION OF ERRORS.

1.

The Supreme court of California erred in holding and deciding that the provisions in Section 1273 of the Code of Civil Procedure of the State of California and of Section 15 of the "Bank Act" of California, which sections purport to escheat to the State of California those certain deposits made in banks specified in said sections, were valid laws and that they were not repugnant to the laws of the United States as to all deposits made in any National Bank or Banks in the United States.

2.

Said Court erred in holding and deciding that said provisions in said sections 1273 and 15 were valid laws as to the deposits specified in said sections 1273 and 15 and in holding and deciding that said sections 1273 and 15 repealed and set aside the provisions of sections 5214 and 5215 of the Revised Statutes of the United States, for the reason that said sections of said Revised Statutes gave a revenue of one-half of one per cent per annum on said deposits made in national banks and which said sections 1273 and 15 purported to escheat to the State of California, and to thereby wipe out of existence said sections 5214 and 5215 of said Revised Statutes.

3.

Said Court erred in holding and deciding that subdivision 7 of section 5136 of said Revised Statutes did not give to the national banks the right to receive deposits and to loan and to reloan and to keep loaned the money received by said banks as deposits, for as long a time as the depositor making such deposit, or his assignees, executors or administrators chose to let such deposits so made by them remain on deposit, with no limitation on the amount of such deposits being loaned, except so far as the United States, by its laws, should prescribe.

4.

Said Court erred in holding and deciding that section 5191 and subdivision 7 of section 5136 of said Revised Statutes, taken and read together, did not provide or does not provide that the First National Bank of San Jose was given the right to loan and keep loaning all its deposits except 15 per cent thereof, and in holding and deciding that said bank was not given by said sections the right to collect all the revenues arising from its loaning the remaining 85 per cent of its deposits, including the 85 per cent of the $1,192.25 deposited by P. A. Campbell.

5.

Said Court erred in holding and deciding that said First National Bank of San Jose did not have the right under such Revised Statutes to keep the deposit made with it by P. A. Campbell of $1,192.25, mentioned in the Complaint filed by the State of California against said First National Bank of San Jose, as long as either the said P. A. Campbell or his assignee, executor or administrator should choose to leave it on deposit and should have the right to the use thereof and the revenue arising therefrom until the dissolution of said bank unless before that time it had been drawn out by said depositor or his assignee, executor or administrator.

6.

Said Court erred in holding and deciding that if, when said bank should be dissolved and after it had

given the notice to all claimants to present their claims as required by sections 5221 and 5235, no such claim was presented for said deposit made by said P. A. Campbell or his assignee, executor or administrator, said deposit could not be used for the payment of the debts then existing against said bank and if not needed for that purpose that it could not be used in distributing the same among the shareholders of such bank, as provided by said section 5236 could and should be done by said bank.

7.

Said Court erred in holding and deciding that the United States had not in the National Bank laws provided a complete scheme or plan for the management of the affairs of a national bank from the commencement of said bank to its dissolution, and erred in holding and deciding that the State could intervene and ignore the laws of the United States made for the complete and entire management of its own banks during their entire life and ignore such laws of the United States by enacting said section 1273 and 15 which are and would be entirely repugnant to such laws of the United States made by the United States even to the extent of setting such laws of the United States aside and actually seizing the money belonging to said banks and thereby lessening the revenue of the United States and taking the property belonging to said banks and its stockholders which the United States law declared should be used by such banks in excess of 15 per cent thereof in loaning the same and enjoying the benefit and income arising therefrom until the dissolution of the bank and then used for the payment of the debts of the Bank, if needed for that purpose, and if not so needed then to be divided among the shareholders of the bank, to which said money belonged and not to the State.

8.

Said Court erred in holding and deciding that the United States had not entered a field by making laws governing the managing and ownership of deposits made in its national banks and in holding and

deciding that the State could enter that field and manage and govern the ownership of said deposits of said national banks.

9.

Said Court erred in holding and deciding that the complaint filed in said action brought by the State of California against said First National Bank of San Jose stated facts sufficient to constitute a cause of action against said bank.

10.

Said Court erred in holding and deciding that an enforcement of said sections 1273 and 15 passed by said State, would not be depriving national banks of property belonging to them without due process of law towit: of depriving them of their ownership of deposits owned by them contrary to the Fourteenth Amendment of the Constitution of the United States that no State shall deprive any person of property without due process of law.

11.

Said Court erred in holding and deciding that an enforcement of said sections 1273 and 15 would not be impairing the obligation of the contract entered into by P. A. Campbell when making such deposit of $1,192.25 in said First National Bank of San Jose, and made and entered by said First National Bank of San Jose when it received said deposit, said contract being that said deposit, until drawn out by such depositor or by his assignee, executor or administrator, should be used and loaned by said bank to the extent allowed and as prescribed by the national banking laws of the United States, and if not so drawn out before the dissolution of such bank, the depositor or his assignee or executor or administrator could then make claim for and receive the same, and if no such claim was then made for the same by such depositor or by his assignee, or executor or administrator that said bank should then use the same as prescribed by sections 5220, 5221, 5234, 5235 and 5236 of the Revised Statutes of the United States

as such sections prescribed and directed that such unclaimed deposits should then be used.

For the errors aforesaid, and each of them the petitioner, The First National Bank of San Jose, prays that the final judgment of the Supreme Court of the State of California made and entered against your petitioner, The First National Bank of San Jose, on August 29, 1921, be reversed by the Supreme Court of the United States and that a judgment be rendered in favor of your petitioner with costs.

Both the demurrer and the answer sets up substantially the same errors above quoted, each and all of which have been and are again urged.

III.

ARGUMENT AND STATEMENT OF THE POINTS OF LAW TO BE DISCUSSED, WITH A REFERENCE TO THE PAGES OF THE RECORD AND THE AUTHORITIES RELIED UPON IN SUPPORT OF EACH POINT. WHEN A STATUTE OF A STATE IS CITED, SO MUCH THEREOF AS MAY BE DEEMED NECESSARY TO THE DECISION OF THE CASE WILL BE PRINTED AT LENGTH, TO WHICH REFERENCE WILL BE MADE ON THE FLY LEAF HEREIN.

The question before the Court is whether Section 1273 of the Code of Civil Procedure of California, (which is set out in full on page 68 of the record), is valid as to its attempt to escheat a deposit made in the First National Bank of San Jose by reason of the fact that such deposit had not, for 20 years, been changed in amount and the depositor had not, for twenty years, notified the bank of his residence.

That section, (passed in 1915), purports in case a deposit has not been lessened or increased during twenty years and the depositor has not notified the bank of his

residence, to escheat such deposit to the State of California. This law does not *on its face* purport to apply to a National Bank; but the Supreme Court of the State of California has assumed and decided that it was intended by the Legislature enacting that Statute to apply to National Banks as well as to State Banks.

For the reasons hereinafter stated we deny that such law of the State of California is valid as against a National Bank deposit the two main reasons being as follows:

First: The National Bank law has expressly provided, as we will point out, that deposits made with a National Bank are for the benefit of that bank. A National Bank is entitled under the National Bank laws to receive money on deposit and to loan out such money to the extent of 85% thereof where such bank is situate in cities of the size of San Jose, California, *with no limit* as to *the time it may use such money* by loaning out the same or in using the same by buying and selling exchange, coin and bullion, or for other various uses from which a bank makes by the use of its money.

On the other hand the National Bank laws expressly provide the conditions which require said bank to keep such moneys as are not called for by the depositor, until the same is called for by him, and *if not* called for by him before the bank goes into liquidation, then that such deposit shall be used for the purpose of paying the debts of the bank and that if any part thereof be not needed for that purpose, that such excess *shall then be distributed to the then shareholders of such bank.*

In this connection we again call attention to the fact that when a depositor deposits money in a bank, *that money immediately becomes the property and assets of*

the bank, and the bank then becomes a debtor of the depositor for the amount of such deposit; but the *money* belongs to the bank itself *and is a part of its assets.* This, as we have said, has many times been decided, not only by the Supreme Court of the State of California, but also by the Supreme Court of the United States.

Second: It has also been held by the Supreme Court of the United States in various cases that the National Bank laws are a *complete* scheme for the regulation and government of National Banks and that, as to the matters which the law provides for the *regulation* of such banks, *the State has no right to pass any law whatever.*

In the present case, as we will point out, the United States has not only passed laws which, on their face directly state that all *uncalled* deposits are at all times, *to be used* by the bank *for its own* benefit, but the United States has also *entered into the field* for the regulation of National Banks *from beginning to end;* and, having done so, that, *of itself,* prevents the State from attempting, in any way, the management or regulation as to those banks.

The Supreme Court of the United States has passed upon the details of point "FIRST" and point "SECOND," just noted, so fully that we think it is only necessary to quote quite extensively from even one of those cases, (the case of Easton vs. Iowa), and also to refer to a few other cases which cite that case with full approval. The case of Easton vs. Iowa is reported in 188 U. S. Rep. 220, and also in 23 Sup. Ct. Rep., page 288, from which latter publication references thereto will herein be made.

That was a case where the State of Iowa passed a law that no bank, or person engaged in the banking business, should, when insolvent, accept or receive on deposit any

money; and that if any such bank or person *should* receive any money upon deposit, when insolvent, then any owner, officer, director, cashier, manager, member or person knowing of such insolvency who should receive or accept such deposit should be guilty of a felony and upon conviction should be punished by a fine or imprisonment.

This Court, in deciding the case of Easton vs. Iowa, first observed that National Banks are not *specifically* named in the State Statute and that it had therefore been argued on behalf of the defendant, who had been convicted in the Iowa Courts, that National Banks were not within the enactment of the *State* law; but the United States Supreme Court said that inasmuch as the *State* Supreme Court had held that the Statute *was* applicable to *all* banks, even those organized under the act of Congress, the United States must accept that construction as correct and therefore should confine its consideration to the question whether, as so construed, the National Bank act was within the jurisdiction of the State.

The attorneys for the State of Iowa argued that the Statute of the State was valid, arguing that National Banks were organized and their business was prosecuted *for private gain* and therefore the State Authorities could conceive of no reason why the officers of such banks should be exempt from punishment prescribed for fraudulent banking. The Supreme Court of the United States then proceeded with its opinion in the Easton case as follows:

> "We think that this view of the subject is not based upon a correct conception of the Federal legislation *creating* and *regulating National* Banks. That legislation has in view *the erection of a system* extending throughout the country, *and independent*

so far *as powers conferred* are concerned, *of state legislation,* which, *if permitted* to be applicable, might impose *limitations* and *restrictions* as *various* and as *numerous as the states.* Having due regard to the *national* character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as *solely organized and operated for private gain.* The principles enunciated in M'Cullough v. Maryland, 4 Wheat. 425, 4 L. ed. 606, and in Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, though expressed in respect to banks incorporated *directly by acts of Congress,* are yet applicable *to the later and present system* of national banks.

"In the latter case it was said by Chief Justice Marshall:

" 'The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a *public* corporation created for *public* and *national* purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted, but the bank *is not such an individual or company.* It was not *created* for its *own* sake or for *private* purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in the case of M'Cullough v. Maryland is founded on, and sustained by, the idea that the bank *is an instrument* which is *"necessary and proper for carrying into effect the powers vested in the government of the United States".*'

"A similar view of the nature of banks organized under the national bank laws has been *frequently* expressed by this court. Thus, in Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, L. ed. 196, it was said:

" 'National banks organized under the act are instruments designed to be used *to aid the Government*

in the administration of an important branch of the public service. They are means appropriate to that end.'

"Such being the *nature* of these *national* institutions, *it must be obvious* that their *operations* cannot be *limited* or *controlled* by *state* legislation, and the supreme court of Iowa was in error when it held that *national* banks are organized and their business prosecuted for *private* gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking. Nor is it altogether true, as asserted by that court, that there is no act of Congress prohibiting the receipt of deposits by national banks or their officers, when a bank is insolvent. It is true that there is no *express* prohibition contained in the Federal statutes, but there are apt provisions, sanctioned by severe penalties, which are intended to protect the depositors and other creditors of national banks from fraudulent banking. It is not necessary to quote at length those provisions, but it will be sufficient to say that banks *organized under the national bank act* are *authorized* to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which their general business shall be conducted, and the privileges granted by law exercised and enjoyed; to exercise by its board of directors, or duly authorized officers, *all* such *incidental* powers as shall be *necessary to carry on the business of banking*, by discounting and negotiating promissory notes and drafts, bills of exchange; *by receiving deposits;* by buying and selling exchange; *by loaning money . . . to report to the Treasurer of the United States, twice each year, the average amount of its deposits*, and *to pay* to said Treasurer *each half year a tax upon such deposits; . . .*

"*It thus* appears that Congress has provided a *symmetrical* and *complete* scheme for the banks to be organized under the provisions of the statute.

"It is argued by the learned Attorney General on behalf of the state of Iowa that 'the effect of the

statute of Iowa is to require of the officers of all banks within the state a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States.

"But we are *unable to perceive* that Congress *intended to leave the field open* for the *states* to attempt to *promote* the welfare and stability of national banks by direct legislation. If they *had* such power it would have to be exercised and limited by *their* own *discretion,* and *confusion* would *necessarily* result from control possessed and exercised by *two* independent authorities." . . .

"In Allen v. Carter, 119 Pa. 192, 13 Atl. 70, the question was whether a state law, which forbade 'any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation, or calling other than his duty as cashier, and which declared the same to be a misdemeanor, was applicable to the cashier of a national bank, and it was held that it was not so applicable, the court saying, among other things:

" 'The national banking act and its supplements *create a complete system* for the *government* of those institutions. Conceding the power of Congress to create this system, I am unable to see *how* it can be *regulated* or *interfered with* by *state* legislation. The act of 1860, if applied to national banks, *imposes* a disqualification upon cashiers of such institutions *where none has been imposed* by act of Congress. If the *state* may impose *one* qualification upon the cashiers, why not *another?* If upon the cashier, why not upon the *president* or *other* officer? Nay, further, suppose the legislation should declare that no person should be a bank director unless he has arrived *at fifty years of age,* or should be the owner of

one hundred shares of stock, could *we* apply such an act to *National* banks? If so, such institutions would have a *precarious existence.* They would be *liable* to be interfered with at *every* step, and it might not be long *before the whole national banking system would have to be thrown aside as so much worthless lumber.'* " . . .

"A leading case in which this court had occasion to consider the limitation of legislation by a state affecting a subject within the scope of action by Congress is that of Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060, from which we quote the following observation:

" 'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the *state legislatures* have a right *to interfere,* and, as it were, by way of *complement* to the legislation to Congress, to prescribe *additional* regulations, and what *they* may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it *does* prescribe, *manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it.'*

"On the immediate subject of control over national banks, it was said, in Farmers & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196:

"The *states* can exercise *no control over them* (national banks), nor in *anywise, affect their operation, except* in so far as Congress may see proper to *permit.* Anything beyond this is *'an abuse, because it is the usurpation of power which a single state cannot give. . . .'* The states have no power, by *taxation* or *otherwise,* to . . . *burden,* or in *any* manner *control,* the *operation* of constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

"*Our conclusions, upon principle and authority,* are that *Congress, having power to create* a system of national banks, *is the judge to the extent of the powers which should be conferred upon such banks,* and has the *sole* power to *regulate* and *control* the *exercise* of their operations; that Congress has directly dealt with the subject of insolvency of such banks by the Comptroller of the Currency, who is authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition; and by the power of visitation by Federal officers; that it is not competent for state legislatures *to interfere,* whether with *hostile* or *friendly* intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government. . . .

"Undoubtedly a state has the legitimate power to define and punish *crimes* by general laws applicable *to all persons within its jurisdiction.* So, likewise, it may declare, *by special laws,* certain acts to be criminal offenses when committed by officers or agents *of its own* banks and institutions. *But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.*

"It was by failing to observe the *distinction* between the *two* classes of cases that we think, the courts below fell into error."

Easton vs. Iowa, 23 Sup. Ct. Rep. 289;

Easton vs. Iowa, 188 U. S. 220.

The above case of Easton vs. Iowa, 23 Sup. Ct. Rep. 289, has never, so far as we have been able to ascertain, been questioned, but has been many times quoted with appoval. We will quote from but two or three cases containing such approval of that case as follows:

The Supreme Court of the United States in the case of Christopher vs. Norvell, 26 Sup. Ct. Rep. 504-5, states the following:

> "Such statutory liability was created for the *protection of creditors, and in order to strengthen the bank in the confidence of the public.* The bank, although *its shares of stock were private* property, *was an instrumentality of the general government in the conduct of its affairs.* Farmers & M. Nat. Bank v. Dearing, 91 U. S. 29, 33, 23 L. ed. 196, 198. In Davis v. Elmira Sav. Bank, 161 U. S. 275, 283, 40 L. ed. 700, 701, 16 Sup. Ct. Rep. 502, 503, the court said that '*national banks are instrumentalities of the Federal government,* created for *a public* purpose, and *as such* necessarily subject to the *paramount* authority of the United States.' This principle was reaffirmed in Easton v. Iowa, 188 U. S. 220, 237, 47 L. ed. 452, 459, 23 Sup. Ct. Rep. 288. See also Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718."

The case of The Roanoke, 23 Sup. Ct. Rep. 491, 494, contains the following:

> "In the very recent case of Easton v. Iowa, 188 U. S. 220, *ante,* 288, 23 Sup. Ct. Rep. 288, it was held that a state law punishing presidents of banks receiving deposits of money at a time when the bank was insolvent, and when such insolvency was known to them, was *unconstitutional* as applied to *national banks* whose operations were governed *exclusively* by acts of Congress. Said Mr. Justice Shiras: 'But we are unable to perceive that Congress *intended to leave the field open* for the *states* to attempt to promote the welfare and stability of national banks *by direct legislation.* If they had such power it would have to be exercised and limited by their own *discretion,* and confusion would necessarily result from control possessed and exercised by two independent authorities.' See also Farmers & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; McCulloch v. Maryland, 4 Wheat. 425, 4 L. ed. 606."

The last case we will cite on this proposition is the case of Yate vs. Jones National Bank, 27 Sup. Ct. Rep., at page 645, wherein the United States Supreme Court says:

"And general considerations as to the *spirit* and *intent* of the National Bank Act (Easton vs. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; Davis vs. Elmira Savings Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502) also rendered necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the national bank act is, *in the nature* of things, *exclusively* governed by the *specific* provisions on the subject contained in that act. Thus, a contrary conclusion would lead to a *varying* measure of responsibility in the *several* states in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean *one* thing in *one* state and a *different* thing in *another*. *The confusion which would result* is aptly illustrated by a review made by the Supreme Court of Ohio in the recent case of Mason v. Moore, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 76 N. E. 932, of the *conflicting state adjudications* as to the proper rule to be applied to fix the liability of bank directors to third persons in an action of *deceit at common law*. The frustration of the public policy embodied in the national bank *system* by the *crippling* of the *usefulness* of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one, *is apparent*. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard

of an uncertain pecuniary liability which the statute imposing the duty did not contemplate."

We call attention of the Court to the following sections of the National Bank law incorporated in the Revised Statutes of the United States which by the express terms of such laws are given to National Banks as well as to the rights that are thereby reserved *to the United States itself;* and, by the latter phrase we intend to include not only the rights given to the United States itself by reason of reserving to itself an annual revenue on the amount of the average annual deposits of National Banks but also in the endeavor of said National Bank laws to guarantee to each of the National Banks a sufficient revenue to induce it to become and continue a National Bank in order for the United States to have and continue to have such National Bank associations as its fiscal agents, which it could not have, as has been said several times by the Supreme Court of the United States, (commencing with the decision of Chief Justice Marshall in McCullough vs. Maryland, 4 Wheat. 425, and Osborne vs. Bank of the United States, 9 Wheat. 738), unless such rights were given by such laws to such National Banks as would allow them to make their banking operations under such laws sufficiently profitable to organize and act under such National Bank laws.

The following is a list of the Statutes of the United States bearing on this subject which would be directly violated by Section 1273 of the Code of Civil Procedure of California if such section is allowed to operate as to National Banks in depriving such National Banks of their rights expressly given by such Statutes. Before giving that list, we call the Court's attention to the fact that in the addenda to this brief will be set out copies of the sec-

tions herein referred to, so far as they have any application to the questions being now discussed.

FIRST.

Section 5136 of the Revised Statutes expressly gives the power to National Banks to receive deposits and to keep the same continuously loaned out to the extent of 85% thereof. The other 15% of such deposits is required by Section 5191 of such Revised Statutes to be kept on hand by the bank for its safety. No limitation whatever is required by said Section 5136 or by any other section of the National Banking laws *which puts a limit upon the time* that the bank may keep the full amount of such 85% of such deposits loaned out, which *even intimates* that the bank shall not *constantly* keep loaned and *constantly* receive interest on such loans.

What right then has the State to *lessen* the amount which the National Bank is expressly given the right to keep loaned out and to *constantly* receive interest on such loans. Is not such a State law, which *lessen's the bank's* rights to its deposits, *in direct antagonism* to the United States Statute which *expressly* gives such rights to the National Banks? Has not such National Bank a right to continue to loan, and re-loan this 85% of its deposits and a right to *continually* collect the interest which may accrue thereon up to the time when such bank may go into liquidation? On what theory is it that the State has a right to *cancel the rights* of the National Bank by simply enacting a State Statute which says that the State will take not only the *principal* of such deposit, and will deprive the National Bank of the accruing interest upon such deposit already made by such National Bank upon such loan, but will deprive the bank from re-loaning the

deposit and hence deprive it of the profits it would have received from the accruing interest upon such loans from the date of such confiscation thereof to the date of the liquidation of the bank?

SECOND.

Section 5191 provides as we have already said that banks in cities of the size of San Jose shall keep on reserve 15% of its deposits. It further states that such association shall not increase its liabilities by making any new loans beyond such 85% of its deposits and that if it does so the comptroller of the currency may notify such bank to *make good* the deficiency of such reserve and if such association of such bank shall fail for 30 days thereafter to make good its reserve, then the comptroller may with the concurrence of the Secretary of the Treasury appoint a receiver to wind up the business of the association as provided in Section 5234 of such Revised Statutes.

Let us suppose that if Section 1273 of the Code of Civil Procedure of California is valid as to deposits made in a national bank and that when such State has enforced its rights under such section there would then be a deficiency in the reserve required by such section to be kept on hand, but that, on the other hand, if said Section 1273 of the Code of Civil Procedure was *not* valid as to deposits in National Banks and hence it had not been able to enforce its claim against said National Bank and that in that case the reserve required of such *National* Bank was *still* on hand; in that case could it be claimed that such attempted legislation by the State of California would not be interfering with *the legislation of the United States in forming and regulating the business of National Banks?*

If such legislation of the State should be held valid and

by reason of its escheat or confiscation of certain of the deposits of the National Bank, such confiscation would have the result of canceling and lessening the deposits of the bank to such an extent as would leave the bank without the necessary reserve required by the National Bank law to be kept on hand; would not the State law be in direct antagonism to the National Bank law? Are not the rights that are expressly given by Congress to National Banks to be protected from the legislation of the State which expressly attempts to violate and destroy those rights which are expressly conferred by Congress?

a. Sections 5520 and 5221 provide for a voluntary dissolution of the bank corporation and a liquidation of its assets. Sections 5234, 5235 and 5236 provide for a *forced* dissolution and distribution of its assets. That the same class of assets are supposed to be on hand, and dealt with in the voluntary liquidation provided for in Sections 5220 and 5221 as exist in Sections 5234, 5235 and 5236 is conclusive as no possible reason can be given why there should be a difference between the dissolution and distribution in a voluntary dissolution and a forced dissolution and distribution. Not only that, but it is also made clear from Section 5205 of the Revised Statutes which provides that where the capital stock of a National Bank has become impaired by losses or otherwise it shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock by assessment upon the shareholders *pro rata* for the amount of capital stock held by each and such section provides as follows:

> "If any such Association *shall fail to pay up* its capital stock *and refuse* to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be ap-

pointed to close up the business of the association *according to the provisions of Section 5234.*"

It is perfectly evident from the language in sections 5205 and 5234 that the law intended the winding up of the bank to be *exactly* the same whether it was done *voluntarily* under Sections 5220-5221 or was done *under the order of the Court* under Sections 5234-5236. This is still more evident from the fact that the bank *has its choice* under Section 2505 either to proceed *voluntarily* under Sections *5220-5221* or allow the *Court* to wind it up under the provisions of Sections *5234-5236*.

It could not be supposed for a moment that the rights of the creditors and shareholders of the bank should be different in one case from what they are expressly stated in the other.

b. Section 5202 of the Revised Statutes expressly provides that the National Bank shall become indebted for *"moneys deposited with"* said bank. That section was passed 51 years before the passage of Section 1273 of the Code of Civil Procedure and the passage of Section 15 of the Bank Act of California, and such Section 5202 meant just what it said. It necessarily included all of its existing deposits and by its very terms such *"indebtedness"* included every *deposit* until the money owed for such deposit was paid, either to the depositor or as provided in Sections 5220-5221 or under Sections 5234-5236 of the Revised Statutes.

No State has the right to preclude the bank from owing such money *to the depositor* until it was paid to such depositor or if not paid to the depositor then to have such money stay on deposit until it should be paid as provided for under Sections 5220-5221, or Sections 5234-5236.

c. Sections 5234-5236 provided how deposits made in

National Banks should be paid. By examining Sections 5234-5236 it will be seen that those sections provide as follows:

That the comptroller of the currency should appoint a receiver, which receiver under the direction of the comptroller should take possession of all the books, records *and assets* of *every* description of such bank, collect all debts, dues and claims belonging to it, and, upon the order of a Court of Record of competent jurisdiction, sell or compound all bad or doubtful debts and, under a like order, sell all the real and personal property of such association as the Court should direct, and, if necessary to pay the debts of such association, to enforce the individual liability of the stockholders. That such receiver should pay over all moneys so made to the treasurer of the United States on the order of the comptroller and also make reports to the comptroller of all his acts and proceedings, and that the comptroller upon appointing the receiver should cause notice to be given by advertisement in such newspaper as he should direct for three consecutive months, calling on all persons who might have claims against such association *to present* the same *and make regular proof thereof,* and that from time to time after full provision had first been made to refund to the United States any deficiency in redeeming the notes of such association, the comptroller should make a ratable dividend of the money so paid over to him by such receiver on all such claims *as may have been proved to his satisfaction or adjudicated in a Court of competent jurisdiction* and as the proceeds of the assets of such association are paid over to him he should make *further dividends* on all claims proved or adjudicated; and the *remainder* of the *proceeds, if any, should be paid over to the shareholders*

of such association or their legal representatives in proportion to the stock by them respectively held.

d. It may be urged that the United States did not reserve to itself the right to escheat uncalled for bank deposits. The reason it did not do so is very evident. It was not because it did not have the *power*, for it certainly had that power since those bank deposits were brought into existence *solely* under the National Bank laws of the United States. Without such National Bank laws there would be no National Bank deposits.

It may be stated here, in passing, that the United States has not infrequently escheated to itself property which, under its own laws, it had a right to escheat. A few instances are here given.

See Addenda to this brief, Section 1890, Revised Statutes, where the government escheated to itself all real estate devoted to religious or charitable purposes to the extent that the value thereof exceeds $50,000.

Also see Addenda, Section 3492 of the United States Compiled Statutes, which provides that aliens under certain circumstances may acquire lands, but which inserts in the latter part of such section the following:

> "*Provided however* that all lands so acquired *shall be sold within ten years* after title shall be perfected in him under said sale, *or the same shall escheat to the United States* and be forfeited as hereinafter provided."

Also see Addenda, Section 3697 Compiled Statutes of the United States which states as follows:

> "Section 3697. . . . provided that *no* corporation, domestic or foreign, *shall acquire and hold real estate in Hawaii in excess* of 1,000 acres; and all real estate acquired or held by such corporation or association *contrary* hereto shall be forfeited *and*

escheat to the United States, but *existing* vested rights in real estate shall not be impaired . . . "

But while the United States did not *choose* to escheat to itself uncalled National Bank deposits, it was because of the reason given by Chief Justice Marshall in the case of Osborn vs. U. S., 9 Wheaton 738, where he said:

"Let this distinction be considered.

"Why is it that congress can incorporate or create a bank? This question was answered in the case of M'Culloch v. The State of Maryland. It is an instrument which is '*necessary and proper' for carrying on the fiscal operations of government. Can* this instrument, on any rational calculation, *effect* its object, *unless* it be endowed with that faculty of *lending and dealing in money, which is conferred by its charter?* If it *can,* if it be *as competent* to the purposes of government *without,* as *with* this faculty, there will be much difficulty in sustaining the essential part of the charter. *If it cannot,* then this faculty *is necessary to the legitimate operations of government,* and was *constitutionally* and *rightfully* engrafted on the institution. It is, in that view of the subject, *the vital part* of the corporation; it is *its soul;* and the right *to preserve it, originates in the same principle with the right to preserve the skeleton or body which it animates.* The distinction between destroying what is denominated *the corporate franchise,* and destroying *its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.*

"This distinction, then, *has no real existence.* To tax its *faculties, its trade, and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.* . . . "

It was upon these views of the case promulgated in the first instance by the United States Supreme Court, and carried into effect by the Congress of the United States, that National Banks were favored in having their uncalled deposits treated as being *in the nature of a tontine.* In other words, that any uncalled deposits should be kept on hand and loaned out for the benefit of the bank and at the close of the life of the bank should belong, *first,* to the bank for *paying debts of the bank,* and, if anything is left over, then to divide the same among the shareholders, *pro rata,* according to the amount of shares in such corporation respectively held by them. This was evidently the view held by the Supreme Court of the United States, as evidenced by its decision in the case of Provident Institution for Savings vs. Malone, 31 Supreme Court Rep. 661, 663.

In that case the Supreme Court of the United States upheld a *state law* which authorizes the *state* to keep in state banks uncalled deposits in state banks upon the express ground that the *state law did not* create, or *attempt* to create, anything *"in the nature of a tontine"* as to those uncalled deposits. The United States Supreme Court in rendering this decision in the case of Provident Institution for Savings vs. Malone, 31 Sup. Ct. Reporter 661, 663, makes the following statement:

> "But the bank insists that there has been no abandonment; that the money is in safe hands where it was originally left, under by-laws which contemplated that the deposit might remain in the bank without interest on sums over $1,600 until the corporation was dissolved. It contends that to deprive it of the benefit of such deposits is to take property without due process of law.
>
> "But while there was a possibility that the money *might* so remain, the bank had no right to require

that it *should* be so left. *Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation,* the *then* depositors would receive the money of those *absent* and *unknown.*"

This language *is substantially a copy* of the language of Section 5236 of the Revised Statutes. *Why* was that language used *unless* it was the view of the Court that such language *gave* to the shareholders of a *National* Bank the deposits of the "absent and unknown depositors"? If that was *not* the reason for using that language, *then why was such language used at all?*

e. The foregoing argument includes the proposition that both the First National Bank of San Jose and the United States itself have been deprived of property rights without due process of law.

f. There is another reason why such assumed escheat is illegal, viz.: That the provisions of the Constitution of the United States expressly provides as follows:

> *"No State shall . . . pass any . . . law impairing the obligation of contracts."*
>
> United States Constitution, Article I, Section 10.

From the sections of the National Bank law which we have already quoted and which provide for the *creation* of National Banks, and for their *regulations,* it will be seen that when a depositor appears at a National Bank to make a deposit and such deposit is made, the laws of the National Bank itself made under an agreement which, shortly stated, is as follows:

1st. That said bank by reason of such deposit *becomes* immediately *the owner* of the money so deposited.

2nd. That the bank thereby agrees to pay the party making such deposit a sum of money equal to the amount

of such deposit when called upon so to do by receiving the check of the depositor to pay the same to the payee of such check.

3rd. That in the meantime, while the bank is still the owner of such money so deposited, such bank has the right to loan upon interest, such money of which it is the owner, and to receive and own and use such interest as is owned by it and that the depositor has no right to stop or prevent the bank from keeping its own money thus loaned out at interest and to receive such interest and use the same as its own property.

4th. That if a depositor does not present his claim for the payment of the amount of such deposits due and unpaid when the bank goes into liquidation after the bank has duly advertised for all parties to present their claims, if any they have, as is required by the provisions of Sections 5221, 5235 and 5236 of the United States Revised Statutes, then that any money due or unpaid upon such unpresented claims will be used to pay other claims against the bank which have been duly presented and allowed, provided it is necessary to use such money for that purpose, but if not needed for that purpose then the money for which such claims might have been made shall be used by distributing the same *pro rata* among the then shareholders of such bank. It may be remarked, however, that, as we have shown, no valid claim could be made by a State that *it* was entitled to *escheat such unpaid claims to itself.*

It will thus be seen that the United States banking laws have made full provision as to what should be done with *uncalled* for deposits made in National Banks. In fact the United States Supreme Court has on more than one

occasion so stated. Quoting from one of its decisions concerning that matter will be found the following:

> "We consider that act as constituting *by itself* a *complete* system for the establishment and government of National Banks . . . *everything essential* to the *formation* of the banks, the *issue, security* and *redemption* of their notes, *the winding up of the institutions and the distribution of their effects,* are *fully* provided for, *as in a separate code by itself.*"
>
> Cook County National Bank vs. United States, 107 U. S. Rep. 445, 458.

We respectfully submit that a State has neither the right nor the power to enact statutes which are in violation of our National Bank laws and we respectfully request that the judgment rendered by the State in this case be reversed and set aside.

S. F. LEIB,
Attorney for Plaintiff in Error.

APPENDIX.

Copies of or quotations from sections of U. S. Revised Statutes:

U. S. REVISED STATUTES.

"Section 1890. No corporation or association for religious or charitable purposes shall acquire or hold real estate in any Territory, during the existence of the territorial government, of a greater value than fifty thousand dollars; and all real estate acquired or held by such corporation or association *contrary hereto shall be forfeited and escheat to the United States;* but existing vested rights in real estate shall not be impaired by the provisions of this section."

U. S. REVISED STATUTES.

"Section 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power. . . .

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, *all* such *incidental* powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits;* by buying and selling exchange, coin and bullion; *by loaning money.* . . . "

U. S. REVISED STATUTES.

"Section 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, *and for no others*: . . . "

U. S. REVISED STATUTES.

"Section 5141. . . . If any such cancellation and reduction shall reduce the capital of the asso-

ciation below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association."

U. S. REVISED STATUTES.

"Section 5191. Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount *equal to* at least twenty-five per centum of the aggregate amount of its notes in circulation *and its deposits;* and every other association shall at all times have *on hand,* in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, *and of its deposits.* Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation *and deposits,* and whenever the lawful money of any *other* association shall be below fifteen per centum of its circulation *and deposits,* such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the con-

currence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four."

U. S. REVISED STATUTES.

"Section 5202. No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by law-suit or otherwise, *except* on account of demands of the nature following:

"First: . . . .

"Second: *Money deposited with* or collected by *the association.*

"Third: . . . .

"Fourth: . . . ."

U. S. REVISED STATUTES.

"Section 5205. Every association which shall have failed *to pay up* its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail *to pay up* its capital stock, *and shall refuse to go into liquidation, as provided by law,* for three months after receiving notice from the Comptroller, *a receiver* may be appointed to close up the business of the association, *according to the provisions of section fifty-two hundred and thirty-four.*"

U. S. REVISED STATUTES.

"Section 5214. In lieu of all existing taxes, every

association *shall pay* to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation, and *a duty* of one-quarter of one per centum each *half*-year *upon the average amount of its deposits,* and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds."

U. S. REVISED STATUTES.

"Section 5215. In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and *of the average amount of its deposits,* and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States."

U. S. REVISED STATUTES.

"Section 5220. Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

U. S. REVISED STATUTES.

"Section 5221. Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency.

and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association *is closing up its affairs,* and notifying the holders of its notes *and other creditors* to present the notes *and other claims* against the association for payment."

U. S. REVISED STATUTES.

"Section 5222. Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States, lawful money of the United States *sufficient to redeem all its outstanding circulation.* The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it was been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account."

U. S. REVISED STATUTES.

"Section 5234. On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such *receiver,* under the direction of the Comptroller, shall *take possession* of the books, records, *and assets of every description* of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such

association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver, shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

U. S. REVISED STATUTES.

"Section 5235. The Comptroller shall, upon appointing a receiver, *cause notice to be given,* by *advertisement* in such newspapers as he may direct, for *three consecutive months,* calling on *all* persons *who may have claims* against such association *to present the same,* and to *make legal proof thereof.*"

U. S. REVISED STATUTES.

"Section 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a *ratable* dividend of the money so paid over to him by such receiver on all *such* claims as may have been *proved* to his satisfaction or *adjudicated* in a court of competent jurisdiction, and, as the proceeds of the *assets* of such association are paid over to him, shall make further dividends on all claims *previously proved* or *adjudicated;* and the *remainder* of the proceeds, if any, *shall* be paid over to the *shareholders* of such association, or their legal representatives, *in proportion to the stock* by them respectively held."

U. S. COMPILED STATUTES.

"Section 3492. SAME: ACQUISITION BY INHERITANCE OR IN COLLECTION OF DEBTS. This act shall not prevent aliens from acquiring lands or any interest therein by inheritance or in the ordinary course of justice in the collection of debts, nor from acquiring liens on real estate or any interest therein, nor from lending money and securing the same upon real estate or any interest

therein; nor from enforcing any such lien, nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured: Provided, however, that all lands so acquired *shall be sold within ten years* after title shall be perfected in him under said sale *or the same shall escheat to the United States* and be forfeited as hereinafter provided."

U. S. COMPILED STATUTES.

"Section 3697. . . . Provided, That *no* corporation, domestic or foreign, *shall acquire and hold real estate in Hawaii in excess* of one thousand acres; and all real estate acquired or held by such corporation or association *contrary* hereto shall be forfeited *and escheat to the United States*, but existing vested rights in real estate shall not be impaired. . . . "